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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/669,154	09/23/2003	Avram Scheiner	279.608US1	1665
21186 7590 03/19/2008 SCHWEGMAN, LUNDBERG & WOESSNER, P.A. P.O. BOX 2938 MINNEAPOLIS, MN 55402				
EXAMINER				
HELLER, TAMMIE K				
ART UNIT		PAPER NUMBER		
3766				
MAIL DATE		DELIVERY MODE		
03/19/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/669,154

Applicant(s)

SCHEINER, AVRAM

Examiner

TAMMIE HELLER

Art Unit

3766

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 March 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-3, 6, 11-13 and 16.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Carl H. Layno/
Supervisory Patent Examiner, Art Unit 3766

/Tammie Heller/
Examiner, Art Unit 3766

Continuation of 11, does NOT place the application in condition for allowance because: Regarding the rejection of the claims as being anticipated by Casavant, the Applicant argues that Casavant fails to disclose monitoring spontaneous respiratory activity. In the amendment after-final of 3/3/08, which has not been entered, Applicant amends this claim limitation to require the controller to monitor spontaneous activity occurring not as a result of diaphragmatic pacing, suggesting that Casavant monitors respiratory activity that does occur as a result of diaphragmatic pacing. The Examiner respectfully disagrees with this idea. It can be seen from Figure 7 that the method and apparatus of Casavant monitors for spontaneous respiratory activity at step 280 period to delivering diaphragmatic pacing at step 284. Therefore, Casavant does in fact monitor spontaneous respiratory activity occurring not as a result of diaphragmatic pacing.

Further regarding the rejection of the claims as being anticipated by Casavant, the Applicant reiterates the argument that the measurement of oxygen saturation and partial pressure in the blood during ventricular fibrillation is not indicative of respiratory activity. The Examiner understand the Applicant's position that oxygen saturation and partial pressure will be low during fibrillation whether respiratory arrest occurs or not. However, if respiratory arrest occurs, the method and apparatus of Casavant as depicted in Figure 7 will detect that a respiratory arrest has occurred. In other words, false positives may occur through the use of Figure 7 during ventricular fibrillation, but a respiratory arrest will not be missed by the invention of Casavant. The Applicant is please invited to call the Examiner at 571-272-1986 if these arguments and this position is not clear in any way.

Regarding the rejection of the claims as being obvious over Scheiner in view of Min, the Examiner believes that the Applicant is arguing that the invention of Min delivers diaphragmatic pacing in conjunction with cardioversion shocks, which are incapable of treating ventricular fibrillation. The Examiner respectfully disagrees with this argument. Min discloses at col. 1, ln. 41 that cardioversion shocks are delivered to treat ventricular fibrillation and further discloses at col. 1, ln. 47-48 that defibrillation shocks are a subset of cardioversion shocks.